

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF OKLAHOMA

TIMOTHY W. CLAY,	)	
	)	
Petitioner,	)	
vs.	)	Case Number CIV-08-68-C
	)	
THE STATE OF OKLAHOMA, et al.,	)	
	)	
Respondent.	)	

**ORDER ADOPTING REPORT AND RECOMMENDATION**

This action for habeas corpus relief brought by a prisoner, proceeding pro se, was referred to United States Magistrate Judge Gary M. Purcell, consistent with the provisions of 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Purcell entered a Supplemental Report and Recommendation (“R&R”) on May 14, 2008, recommending the Petition be dismissed as it contained exhausted and unexhausted claims. The Court adopted that R&R on June 5, 2008, and entered a Judgment of Dismissal Without Prejudice. On June 12, 2008, Petitioner filed a second 28 U.S.C. § 2254 Petition. Consistent with the previous Order, the newly filed Petition was referred to Judge Purcell. By R&R filed July 24, 2008, Judge Purcell noted that Petitioner still pursued unexhausted claims and again recommended dismissal without prejudice. Petitioner has timely objected. Attached to Petitioner’s Objection was a copy of an Oklahoma Court of Criminal Appeals (“OCCA”) opinion which Petitioner asserts demonstrates he has exhausted his claims.

Review of the materials in this case reveals that Petitioner continues to press a mixed claim, that is, one containing both exhausted and unexhausted claims. Contrary to Petitioner’s assertion in his Objection, the OCCA opinion does not demonstrate exhaustion.

Rather, in footnote one, the OCCA sets forth the claims raised by Petitioner before that court.\* Comparison of those claims to the claims set forth in the newly filed Petition establishes that unexhausted claims remain. Accordingly, the proper course is again dismissal without prejudice. Miranda v. Cooper, 967 F.2d 392, 398 (10th Cir. 1992). Petitioner is cautioned that additional filings contrary to this Order and the Court's earlier Order will result in dismissal with prejudice as a sanction.

Accordingly, the Court adopts, in its entirety, the Supplemental Report and Recommendation (Dkt. No. 25) of the Magistrate Judge, and for the reasons announced therein, dismisses this petition for habeas corpus relief. A judgment will enter accordingly.

IT IS SO ORDERED this 15th day of August, 2008.

  
ROBIN J. CAUTHRON  
United States District Judge

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\* The Court accepts the OCCA's determination of the issues before it because Petitioner has offered no evidence to the contrary. See 28 U.S.C.A. § 2254(e)(1):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.